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MISCELLANY.

The Origin and Use of Private Seals under the Common Law.—The origin of seals is so ancient that their use may be said to be co-extant with the written word. It is very probable that when mankind evolved from the age of cuneiform writing on clay to the age of writing on papyrus, seals first came into use; and their use, in one form or another, has never been discontinued, from the time when the Pharoahs of Egypt and the kings of Babylonia and Assyria placed their signets to documents of public import, down to the present day when the office boy brings from the stationer's a printed form closing with the words "Witness our hands and seals this blank day of blank" and bearing those initials of terrific gravity "L. S." printed to the right of the space for the signature. The grantor, or contracting party, or whoever the client may be, is ignorant, of course, of the reason for the seal and of the significance of those mystic letters "L. S.," but he affixes his signature to the paper, and the result is the most solemn and formal document known to our jurisprudence, namely, a deed, an instrument under seal.

As to the origin of seals in the common law, the weight of authority seems to be that they were introduced into England by the Normans at the time of the Conquest.[1]

Coke on Littleton seems to be at variance here, for he says:[2] "The sealing of characters and deeds is much more ancient than some out of error have imagined; for the charter of king Edwyn, brother of king Edgar, bearing date anno Domini 956, made of the land called Jecklea in the Isle of Ely, was not only sealed with his own seale . . . but also the bishop of Winchester put to his seale. . . ." Furthermore, there is a record of a sealed charter being granted by Edward the Confessor to the Abbey of Westminster.[3]

These apparently conflicting assertions may be reconciled, however, by qualifying the statements of Pollock & Maitland, and of Holmes, to read that prior to the Norman Conquest none but kings made use of seals. In this connection it is interesting to note that Richard I.[4] was the first of the English kings to use a seal engraved with a coat of arms instead of one bearing the likeness of the sovereign.[5]

There is a quaint account in the book entitled "Termes de la Ley" of how Edward the Third gave to Norman the Hunter,

> "The Hop and the Hop-Town,
> With all the bounds upside down;
> And in witness that it was sooth,
> He bit the wax with his foretooth."

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1. 2 Poll. & Mait. 221; Holmes, p. 272.
2. Fol. 7a.
3. Termes de la Ley, tit. Fait.
4. 1189-1199.
5. Coke's Littleton, 7a.

The Saxons used to subscribe their names to their written documents, commonly adding the sign of the cross after their signatures, in the presence of a great number of witnesses, whose names were set forth at the end of the instrument. This custom continued down to the time of the Conquest. Ingulphus, the Abbot of Croiland, is quoted as saying: "The Normans do change the making of Writings (which were wont to be firmed in England with Crosses of Gold, and other holy Signs) into an Impression of Wax, and reject also the manner of the English Writing."

For a century or more, seals were used solely by the king, counts and bishops. In a case reported in 1154, the defendant, a knight, defended on the ground that certain writings granted by his ancestors bore no seal, for which he was reprimanded by Richard de Luci, then Chief Justice of England under Henry II., who said that seals pertained to the king and nobility only.[6] A man of lower degree could execute his bond by carrying it before his lord and having him affix his seal.[7]

In the beginning, therefore, seals were more or less public in their nature, and their use was confined strictly to those persons having, partially at least, the attributes of sovereignty and whose acts consequently were entitled to a measure of public credit. The sealing by a noble of a bond executed by his vassal was an act of authentication and the lord partook of the character of a public officer who certified to the execution of the document.

Within a century after Richard de Luci's dictum, *private* seals, in the strict sense of the word, came into being; that is, their use ceased to be limited to the nobility and was extended to individuals of lower rank. Freemen fashioned seals for themselves out of monograms, or the images of animals or flowers, varying the ancient custom of having them engraved with the coat of arms or likewise of the owner.

Likewise, the use of charters was extended during the same period. A charter was originally a document, usually under the royal seal, by which the king conferred certain privileges. Later, private charters came into being, by virtue of which a right or estate in lands was granted in return for service. Regarding their execution, Bracton says:[8] "And donations are sometimes made in writing, as in charters for perpetual memory, and that the donation may be more easily proved. Yet it is notwithstanding valid, although no writing intervene, provided it has other proofs." This bears out the assertion of Holmes,[9] that "the conclusive effect (of a charter) was

6. Termes de la Ley; Holmes, p. 272; Bigelow's Placita Anglo-Normannica 175-177.
7. 2 Poll. & Mait. 223; Sullivan's Lectures on the Feudal and English Laws, VI, 67.
8. De Legibus Angliae, fol. 33b.
9. P. 272.

due to the satisfactory nature of the evidence, not to the seal."

A charter or deed, therefore, originally derived its weight from the fact that it was in writing, in conformity with the principles of the Roman system of jurisprudence, which obtained on the continent. The rule of the civil law was that a written document constituted merely a higher form of proof than the testimony of witnesses alone; a writing, duly executed, was said to be self-proving, from which comes the Latin maxim "Standum est chartae." [10] Where a seal was affixed to such an instrument it was for the purpose of authentication merely,[11] and entitled the writing to more credence than if it were unsealed; and the weight given to such authentication depended upon the rank of the person whose seal was used.

Inasmuch as the knowledge of letters was confined to the clergy and a few of the nobility, and seals, personal or borrowed, having been more or less generally adopted, they came to be used in lieu of signatures. In other words, the old Saxon custom still persisted; only, instead of signing a mark or placing the sign of the cross after a signature, as was done in more ancient times, a seal was affixed in place of it.[12] And as late as the year 1681 it was held in Lemayne *v.* Stanley [13] that the placing of a seal was a sufficient signing.

This confusion of signature and seal probably gave rise to the doctrine that an instrument in writing should of necessity have a seal, and as early as Britton's time [14] this formality seems to have been required.

The seal, however, did not necessarily have to be peculiar to the person using it, according to Bracton.[15] And Britton says, to the same effect: "Afterwards let some of the neighbours who are freemen be called as witnesses, in whose presence the charter should be read and sealed, and the names of the witnesses should be written in the charter. . . . If the feoffor has no seal of his own, a borrowed seal will be sufficient." [16]

The rule making a seal requisite to every written instrument is stated by the Earl of Halsbury [17] in these words: "Peculiar solemnity attached to a written record of a man's intention to make a gift of land or to pay a sum of money or perform some other act, and it was held that, when a writing of this kind was produced, the person purporting to be bound thereby should be obliged to give effect to his intention as expressed therein. . . . In times soon after the Norman conquest it was considered that a writing should

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10. Escriche, Diccionario de Legislacion y Jurisprudencia, tit. "Carta."
11. Escriche, tit. "Sello."
12. Sullivan, lect. VI, p. 67; lect. XXIX, p. 296; Termes de la Ley.
14. 3 Lev. 1.
15. Fol. 38.
14. 1291-1292.
16. 1 Nichol's Britton 257.
17. Laws of England, Vol. X, p. 357, et seq.

have this effect, even though it were unsealed. But afterwards it was required that the seal of the person intended to be bound should be affixed to the writing as a guarantee of its authenticity, or else it should not be admitted in evidence against him." There is the report of a case in the year 1302 [18] which holds that an acquittance lacking a seal is without value as evidence.

An exception to the above rule was founded on the custom of London and other particular places.[19] The conclusion which naturally follows is that London and other trading towns followed the customs of merchants, which were based on the continental law.

This conflict between the common law doctrine and that of the law merchant endured for centuries, and it was not until 1676, when the statute entitled "An Act for the Prevention of Frauds and Perjuries," [20] was enacted, that unsealed writings were admitted in evidence of oral agreements.[21]

This statute, which was the forerunner of all our various modern statutes of frauds, was not devised to make contracts in writing actionable as such, but was intended only to prevent suit being brought on certain oral contracts unless there was some evidence to support the contract, such as part payment or a memorandum "signed by the party to be charged." Lord Mansfield, in 1765,[22] fell into the error of supposing that this statute inaugurated the civil law usage of allowing unsealed written contracts to be sued on; but he was overruled by the House of Lords in 1778, which laid down the following rule: "All contracts are, by the laws of England, distinguished into agreements by specialty, and agreements by parol; nor is there any such third class as some of the counsel have endeavored to maintain, as contracts in writing." [23]

The old doctrine of the requirement of a seal to an instrument in writing was so firmly implanted in English jurisprudence that the peculiar effect attributed by the common law to a sealed writing remained established as an integral part of the law, and comes down to us in the guise of the rule that a seal imports a consideration, or rather dispenses with the necessity for a consideration. In 94 U. S. 76, the court said that a "seal makes an instrument a specialty and consideration is presumed."

Ames says: "There are two classes of specialty contracts in the English law—common law specialties and mercantile specialties. The first class includes bonds and covenants, i. e., instruments under seal; the second class includes bills and notes and policies of

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18. Y. B. 30 Edw. I, 158.
19. 11 Cyc. 125; Termes de la Ley.
20. 29 Car. II, c. 3. **21.** Halsbury, Vol. X, 419.
22. Pillans *v.* Van Mierop, 3 Burr. 1663, 1669.
23. Rann *v.* Hughes, 4 Bro. P. C. 27, 7 T. R. 350 note, 2 Eng. Reprint 18.

insurance, and possibly other mercantile instruments." [24]

"Contracts under seal derive their validity from their form alone and are binding even without consideration, whereas simple contracts are invalid unless there is a valuable consideration for the promise." [25]

This subject of consideration, which is so important an element in our law of contracts, deserves more than passing mention.

It is safe to say that this anomalous theory is the result of a misconception by the later English jurists of the formalities essential to constitute a binding agreement under the Roman law. These formalities were of various sorts. For instance, in the contracts of bailment, pledge, and loan of fungible or non-fungible goods, the contract was in *re,* and became binding as soon as the subject matter of the contract passed from the owner to the other party. In the *stipulatio,* the contract arose by virtue of the form of the words used, which manifested the solemn deliberation of the party to be bound. In the contracts reduced to writing, the binding force proceeded from the formal act of embodying the agreement in a written instrument which constituted a higher degree of evidence. The majority of the contracts of these three classes were unilateral, the pure bilateral contracts being consensual and comprising purchase and sale, lease, labor and services, agency and others. A necessary element of the contract of sale was the *traditio,* or delivery, of the thing sold.

Where any one of the above formalities was present, a *pactum vestitum* resulted, upon which action could be brought; in the absence thereof, the result was a *pactum nudum,* which was not actionable, but could be availed of by way of defense.

That the essence of a contract in England at the end of the thirteenth century was identical with this, may be seen by referring to Britton, who says: "An obligation by contract may arise in many ways by the united consent of the parties; which consent is sometimes naked and without clothing, and sometimes clothed. From a naked obligation no action arises, except by common assent; it is necessary therefore in every obligation that it be clothed. An obligation should be clothed by five incidents, by a material thing, by words, by writing, by unity of will, by delivery, by relation (joynture?).

"It is clothed by a material thing, when anything is lent and borrowed, to be restored on a certain day. . . .

"The second kind of clothing is by words passing between the creditor and debtor, by which they come to an agreement by offers and stipulations.

"The next incident is writing. . . .

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24. Ames' Bills and Notes, quoted in 131 Fed. 517, 522.
25. Halsbury. Vol. VII, 332.

"The next incident is unity of will and consent. . . .

"The next incident is delivery, which is an induction of the thing into possession with the consent of the creditor." . . .[26]

Now, it is axiomatic that every contract has a reason for being; there is some motivating cause which prompts each of the contracting parties to enter into agreement, whether it be desire for gain and profit or merely an intention to bestow some favor or benefit; "id quod inducet ad contrahendum."[27] Where this cause is lacking, the contract has no reason for being, and is therefore void; and where this underlying cause is unlawful, the contract is unlawful and therefore void.

The Civil Code of Chile gives what is perhaps the clearest exposition of this fundamental, in article 1467, which reads: "No obligation can arise without an actual and lawful cause; but it is not necessary that the same be expressed. Mere generosity or charity constitute sufficient cause. Cause is understood to be the motive which leads to the act or contract." . . .[28]

Under the ancient Iberian laws contracts could be made rather informally, but Title X of the fifth Partida of the Alphonsine code re-established the rigid formalism of the Roman system. Coincident with this revival arose the doctrine that the *causa* or cause must be stated in the contract, otherwise a *nudum pactum* would result and no action would lie thereon.[29]

The seven Partidas, the compilation of which was begun in the reign of Alonso the Wise, did not become effective until the year 1348, due to the opposition of the people. They were frequently amended, and in 1386 it was provided that a defendant could not raise the objection that the scrivener before whom the contract was executed was not a public scrivener, or that a stipulation—meaning an agreement made with due solemnity—had not been entered into.[30] Thus any act or words by which a man manifested his intention to be bound created a valid obligation.

The more liberal rules respecting contractual relationship prevailed and were confirmed by the Recopilación[31] of the year 1567.

The modern rule of the civil law is that the cause does not have to be set forth in a written contract, no matter what its nature. Alcubilla says,[32] referring to articles 1275 to 1277 of the Civil Code of Spain: "The cause must be lawful and genuine. It need not be expressed, because the existence thereof is always presumed." The

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26. 1 Nichol's Britton 156. **27.** 6 Toullier 166.

28. See also Civil Code of the Federal District of Mexico, Art. 1281; Civil Code of the Dominican Republic, Art. 1131.

29. Commentaries of Diego Pérez of Salamanaca on the Royal Ordinances of Castile, lib. III, tit. VIII, p. 616, col. 1.

30. Ibid., p. 610, Ley III.

31. Ley II, tit. XVI, lib. 5.

32. Vol. III, 486.

provisions of the Civil Codes of Honduras[33] and of Cuba[34] are identical with those of the Spanish code in this respect. To the same effect are article 1132 of the Code of Napoleon and article 1888 of the Civl Code of the State of Louisiana.

The civil law theories of contract were brought strongly to the attention of the English courts when bills of exchange first became common in the Island about the sixteenth century. These negotiable instruments under the continental law were, like notarial documents, actionable merely by production in court; they constituted *prima facie* evidence of their contents, and put the burden of defense immediately upon the defendant. They were an innovation in England and went contrary to the ancient doctrine that an unsealed writing could not be produced in evidence.

In applying the diverse rules applicable to contracts under the common law and the law merchant, the courts filched the *causa* or "cause" from the civil law, rechristened it "consideration" and made it a necessary formality of contracts, which could be dispensed with only where another formality of equal weight, viz., a seal was present, or where the contract was a commercial one and came under the law merchant. This "consideration" soon became distorted into the common law doctrine of "*valuable* consideration" as a prerequisite to the validity of a contract, under the presumption that when a party surrendered a thing of value he had entered into agreement with due deliberation, which formality was as efficacious as the ancient solemnities set forth by Britton.[35] Likewise, the Latin maxim "Ex nudo pacto non oritur actio" was perverted to cover the case where such consideration was lacking.

That the doctrine was well established long before 1700 is shown by "Termes de la Ley" which gives a typical example of the common law idea of what constituted a *nudum pactum,* as follows: "But if a Man make a promise to me, that I shall have xx s. and that he will be Debtor to me thereof, and after I ask the xx s. and he will not deliver it; yet I shall never have any Action to recover this xx s. because this Promise was no Contract, but a bare Promise, and Ex nudo Pacto non oritur Actio. But if any thing were given for the Twenty Shillings, though it were but to the value of a Penny, then it had been a good Contract."

The Court of King's Bench in 1765 attempted to break away from this theory of a consideration being necessary to a *written* contract, and quoted Vinnius[36] and Plowden[37] as authorities for the statement that a contract entered into with the formalities of a *stipulatio* or executed in writing was good without consideration.[38] This case,

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33. Art. 1572.
34. Art. 1277.
35. 1 Nichol's Britton, 156.
36. Lib. 3, tit De Obligationibus.
37. 380 b.
38. 3 Burr. 1663, 1670.

however, was overruled, as stated above, by the House of Lords in 1778.[39]

The law in England at the present day is that a contract made without valuable consideration must be under seal. There are four other classes of contracts which are required to be made by deed, namely: those of corporations, leases for more than three years, assignments and surrenders of leases, and assignment of sculpture.[40]

The reason for a corporate seal is, as given by Blackstone, [41] that "a corporation, being an invisible body, cannot manifest its intentions by any personal act or oral discourse; it therefore acts and speaks only by its common seal." It appears that a corporation "may change its seal at pleasure, and even make use of the seal of an individual."[42] It may, however, by the express terms of its charter be enabled to contract without using its seal, and one incorporated for trading purposes has a general power to contract not under seal, as also one which has power to bind itself by the contract contained in a negotiable instrument.[43] A corporation sole, of course, is not required to have, although it may use, a seal.[44]

In Lord Coke's time, a seal was wax bearing an impression, and wax without an impression was not a seal.[45] In our modern jurisprudence the intention of the signatory governs, and no strict adherence to form is required. But an English case in 1888 laid down the rule that "a mere circular line enclosing the letters L. S. does not purport to be a seal; it is a mere indication of the place where the seal should be put.[46] In New York[47] and in most other states of the Union, this would be considered good as a seal. Even a little red paper sticker or a flourish of the pen will, in the majority of states, convert an instrument in writing into a specialty, give it the effect of a deed, extend the limitation of an action thereon to twenty years, and dispense with the necessity for a consideration.[48]

That so important a result should arise from so inconsequential an act is a grave defect in our jurisprudence. Our modern rules of law have retained the form but not the substance; we give weight and solemnity to a casual act lacking any element of solemnity; we hold to the mummery of a formula and ascribe to it a special sanctity which is wholly without reason.

It is, perhaps, vain to hope that the anomalous and absurd doctrine of valuable consideration will ever be jettisoned by our legislative ship, and New York has gone so far as to establish that a seal is only *prima facie* evidence of sufficient consideration, which must

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39. 4 Bro. P. C. 27.
40. Halsbury, Vol. VII, 360.
41. 1 Bla. Com. 475.
42. Halsbury, VIII, 309.
43. Ibid., p. 382.
44. 1 Bla. Com. 475.
45. 3 Inst. 169.
46. Re Balkis Consolidated Co., 36 W. R. 392.
47. Gen. Constr. L., 44.
48. 1 McLean 462; 94 U. S. 76, 84; 140 N. Y. 249, 258; 108 N. C. 134.

be proved if attacked.[49] But since the use of private seals has become unnecessary by statute[50] in this jurisdiction, it would seem best that the hedging about of seals with certain exalted attributes be discontinued and that a sealed instrument stand on the same footing as one which lacks that now empty formality. Our law would then be in accord with that of the more progressive states, such as Nebraska and Iowa, which have abolished their use absolutely.—R. C. Backus, in *American Law Review.*

49. C. Civ. Proc., 840. **50.** Reap Prop. L., 240, 291.

IN VACATION.

Right of Privacy.—"You insist that the officer arrested you while you were quietly attending to your own business?"

"Yes, your Honor. He caught me suddenly by the collar, and threatened to strike me with his club unless I accompanied him to the station house."

"You say you were quietly attending to your own business, making no noise or commotion of any kind?"

"Yes, your Honor."

"What is your business?"

"I'm a burglar."—Lippincott's.

Monkeying with the Law.—Geordie had a small dog, and was summoned for keeping a dog without a license. He pleaded it was only a pup.

"How old do you say he is?" asked the magistrate's clerk.

"Aa divven knaa exactly," replied Geordie, "but he's only a pup."

Expert evidence, however, proved it to be a dog and Geordie was duly fined. As Geordie was leaving the court, he turned to his wife and remarked:

"Hang me if Aa can understand it. Aa said the seym thing last year, and the year before, and they let me off. Noo they fine me. Aa suppose somebody's been meesin' aboot with the law!"—Newcastle (Eng.) Chronicle.

Proof of Faithful Execution of Trust.—A Turkish story runs that, dying, a pious man bequeathed a fortune to his son, charging him to give £100 to the meanest man he could find.